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Bid Protests: Analysis To Date

William Lucyshyn

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Bid Protests Analysis to Date

Jacques S. Gansler, Ph.D.

Professor and Roger C. Lipitz Chair

Director, Center of Public Policy and Private Enterprise

William Lucyshyn

Director of Research, Center for Public Policy and Private Enterprise

School of Public Policy

University of Maryland

NPS Acquisition Research Symposium

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Bid Protests



Bid Protest Study

- ➡ Review History and Policies
- ➡ Data Analysis
- ➡ Cases
 - LOGCAP IV Bid Protest
 - ITES-2S Bid Protest
 - Linguist Support for Operation Iraqi Freedom (OIF) Bid Protest
 - HR Solutions Bid Protest
- ➡ Preliminary Conclusion and Recommendations



Current Bid Protest Process at GAO

- ➔ The current bid protest process was formalized under the Competition in Contracting Act (CICA) in 1984.
- ➔ A GAO protest must be filed by an “interested party”, protestors may challenge:
 - The acceptance or rejection of a bid or proposal [but not on decision, only on process]
 - The award or proposed award of a contract,
 - Defective solicitations that could have restrictive specifications,
 - Omission of a required provision,
 - And, ambiguous or indefinite evaluation factors.



Current Bid Protest Process at GAO (cont)

- ➔ Once the protest is filed, the GAO will notify the agency (awarding agency has 30 days to file a report citing facts, relevant law, and any documentation related to the award).
- ➔ GAO has 100 days to respond to a bid protest (express option takes only 20 days).
- ➔ If the a protestor clearly states legally sufficient grounds for the protest it has merit, if not the protest will be dismissed.
- ➔ If a protest has merit, it will then be reviewed further and either sustained or denied.
- ➔ GAO will sustain a protest if it feels the agency violated procurement statutes or regulations (unless these did not prejudice protester).
- ➔ GAO will deny a protest if it does not believe the protestors claims are supported by the record or the law.
- ➔ Recent decision allows protests on tasks (under IDIQs).
- ➔ Agency is not required to follow GAO ruling—but it is normally used as guidance for future actions.



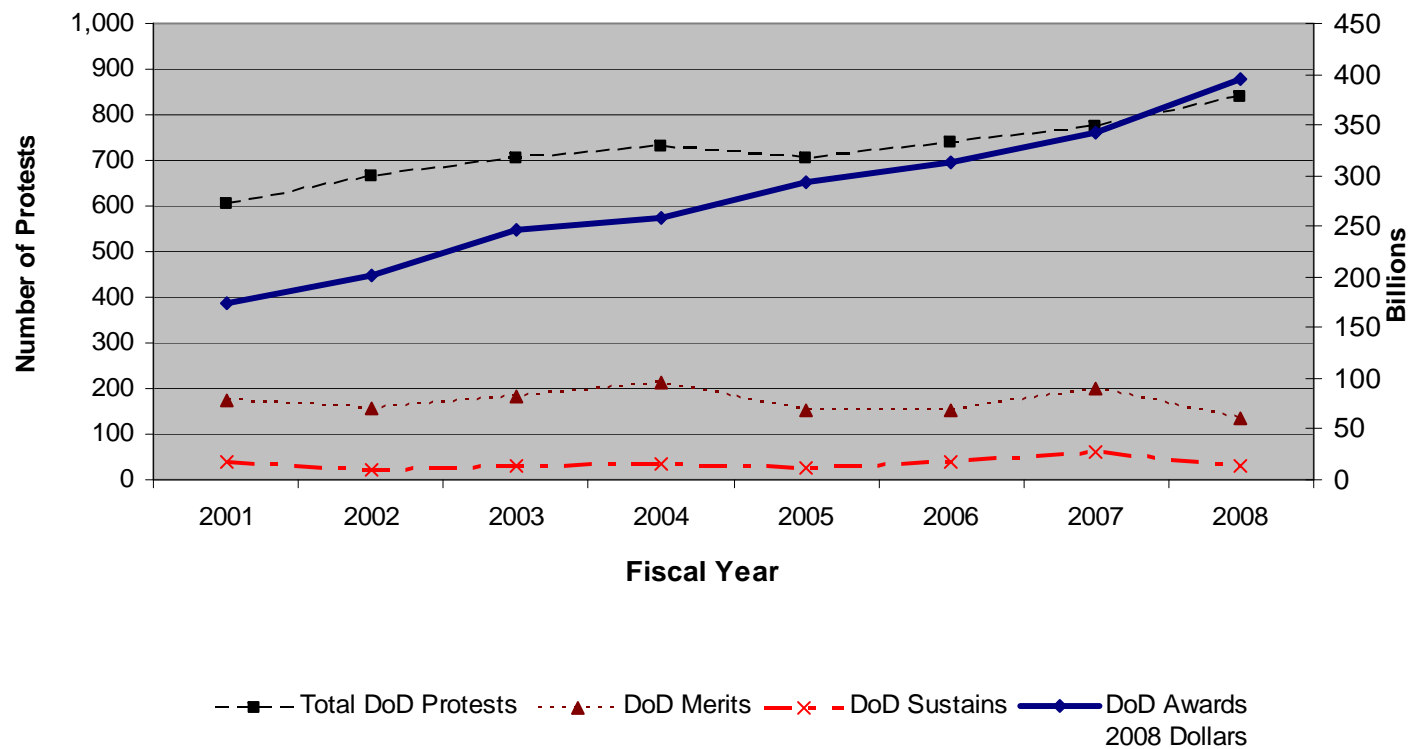
Research Methodology

- ➔ Data was collected via open sources including:
 - GAO bid protest decisions and reports.
 - DoD press releases and reports.
 - Corporate press releases.
 - The Federal Procurement Data System
- ➔ Data collected includes:
 - Bid protests: by year, by service, contract type, contract size, business size and protest reason
 - Sustain, Deny and Dismiss decisions: by year, by service, contract type, contract size, business size and protest reason.
 - Number of contract actions from 2001-2008: by year, by service.
 - Dollars contracted: by year, by service.



Summary Data

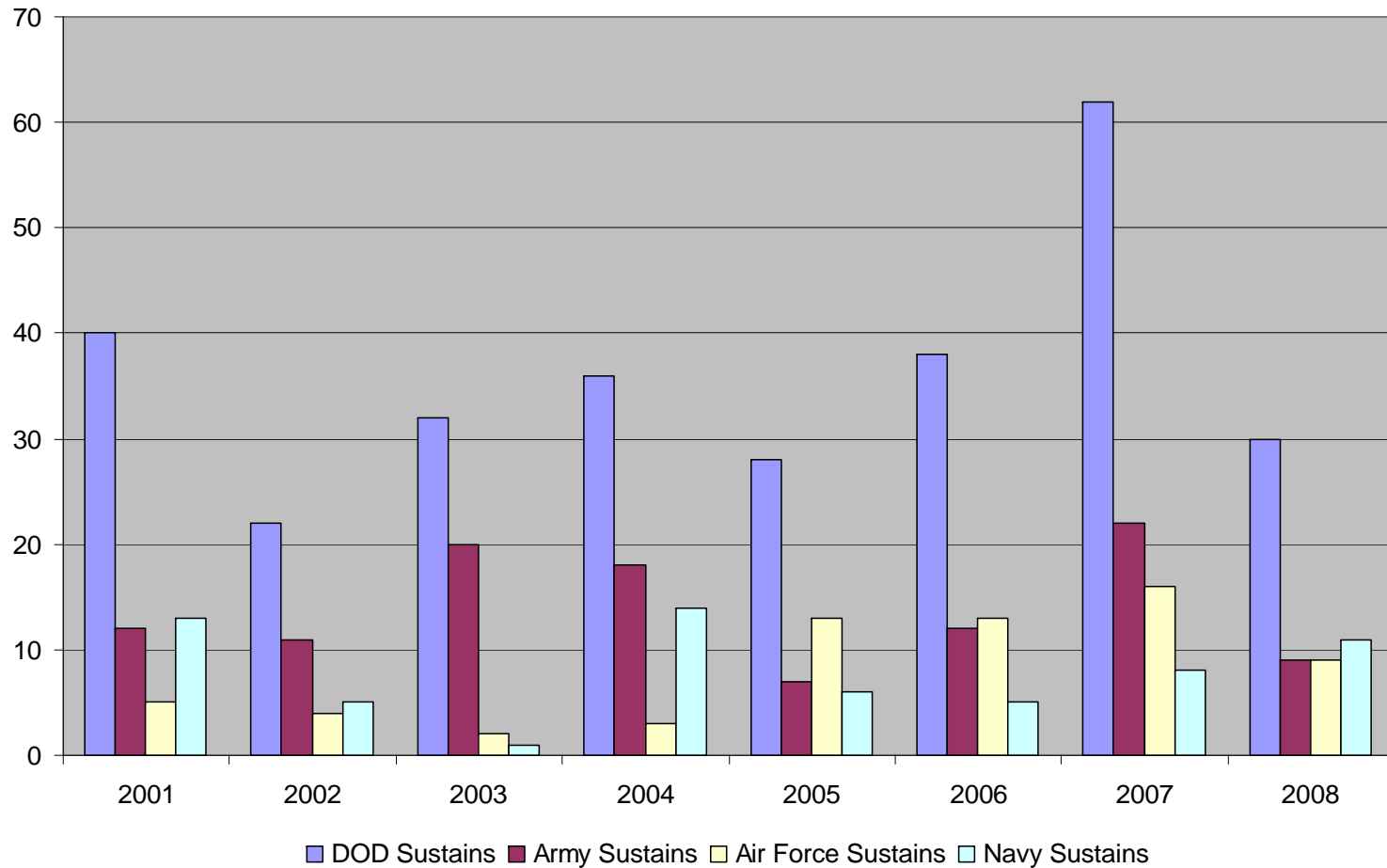
DoD Bid Protests
2001 - 2008



Bid Protests



Sustained Protests (2001 -2008)

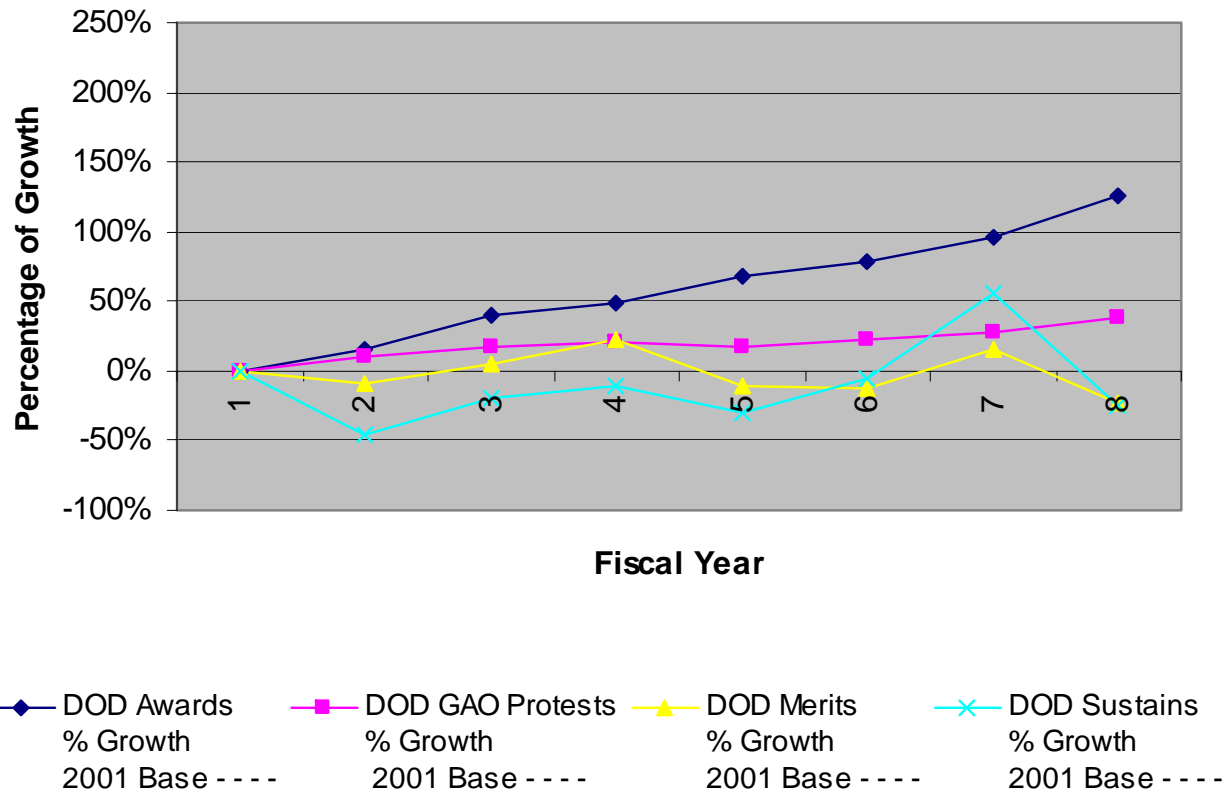


Bid Protests



Percent Growth

DOD Total
% Growth (Awards Dollar v. Sustains)
2001 - 2008

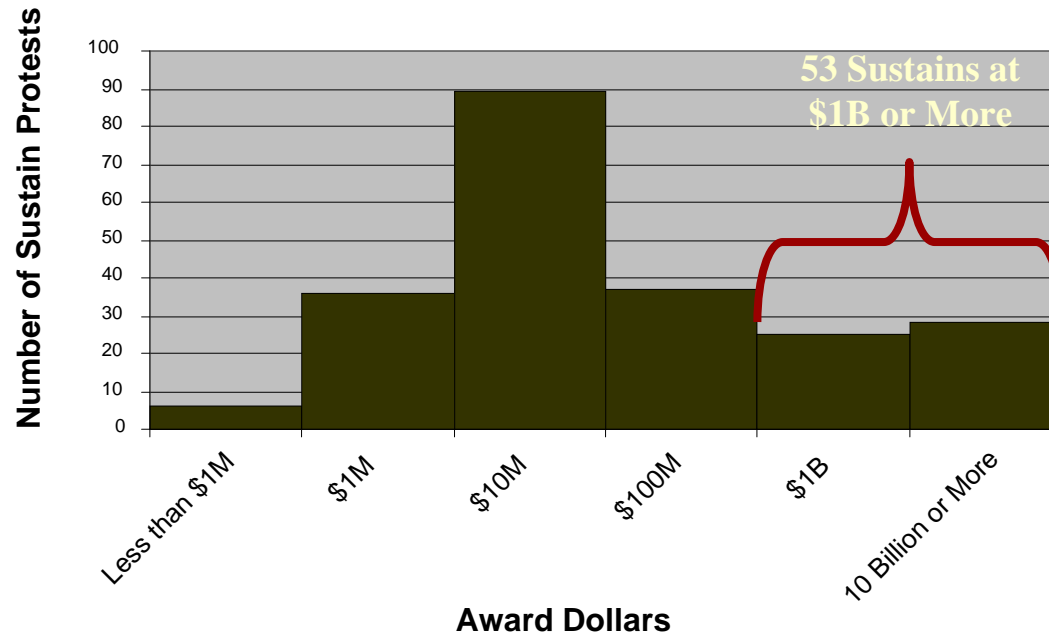


Bid Protests



Distribution by Contract Value

DOD - Sustain Awards
Distribution
2001 - 2008



FY01-FY08
Total Contract Actions
7,711,596
Only 61 Contract
Awards Over \$1B

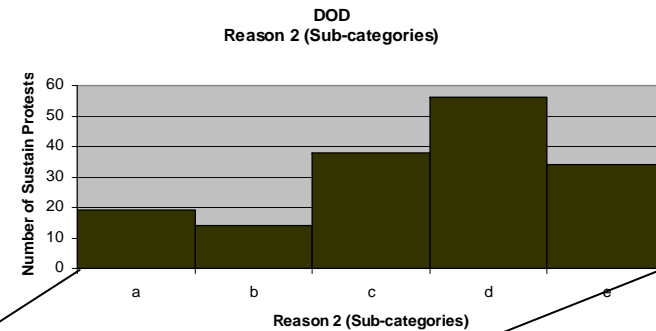
Bid Protests



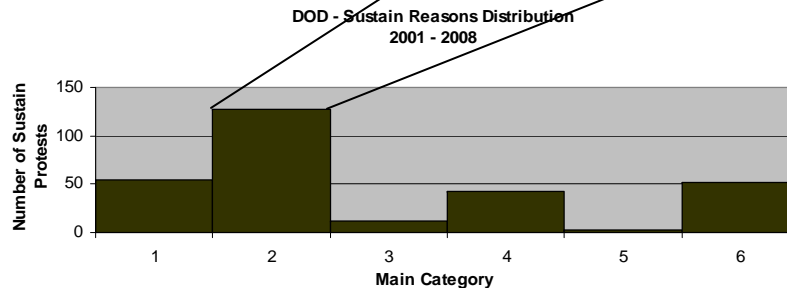
Reasons for Protests

Reason 2 Sub-categories:

- Source selection
- Past Performance
- Technical Evaluation
- Price/Cost Proposal, Cost Evaluation
- Did not hold meaningful discussions



Aggregate DoD Sustains



1. "Terms of RFP"
2. "Agency Mis-evaluated"
3. "Cancellation of Contract / Agency Chose to Perform Work as 'In-house'"
4. "Initial Awardee is Outside the Criteria of RFP/RFQ"
5. "Conflict of Interest"
6. "Other Reasons" including:
 - Small Business set aside/concerns not addressed
 - Elimination from selection on no good basis
 - Award was made at a higher price than RFP

Bid Protests



Impacts

- ➔ Programmatic and legal support
 - For large programs that are recompeted this will involve many man-months of effort.
- ➔ We examined program delays for contracts over \$100M
 - Average delay was 350 days (almost a year)
 - Longest is 1012 days (almost 3 years)
 - CSARX was 900 and counting (over 2 years, plus)
 - These delays can have operational, programmatic, and budgetary penalties.
 - Delays may significantly benefit an incumbent



LOGCAP VI

Bid Protests

LOGCAP IV – Background

- ➔ Logistics Civil Augmentation Program (LOGCAP) provides world-wide logistics and sustainment support for the Army
 - Most notably under harsh and hostile conditions (3 previous LOGCAP contracts have been successful).
- ➔ LOGCAP IV was designed to provide an award of up to three ID/IQ contracts for a base period of 1 year with nine 1-year options with a total estimated value of \$150 billion.
- ➔ The RFP required that each contract under the LOGCAP IV umbrella should have a core program office with a maximum of \$5 billion per year, per contract.
- ➔ Multiple task orders (TOs) would be issued during the performance period, each TO would be competed.
- ➔ Army received proposals from Fluor, Kellogg, Brown and Root Services Inc. (KBRSI), DynCorp, IAP, and Contingency Management Group, LLC. (CMG).





LOGCAP IV – Source Selection

- ➔ A fictional support scenario in Sierra Leone was used to evaluate proposals.
- ➔ Required bids/plans for construction and 22 Combat Service Support functions (CSS), including supply, transportation, life support, and maintenance support to U.S. Forces.
- ➔ Offerors were to respond using a technical execution plan (TEP).
- ➔ Army created a variation in the program to see how effectively offerors would respond.
- ➔ The change called for the establishment and operation of a sea port of debarkation and five additional FOBs, as well other construction activities and 69 CSS functions supporting a total of 11,500 people at eight locations.

LOGCAP IV – Evaluation

- ➔ Awards based on best value to the government, considering the evaluation factors of management, past performance, technical (scenario), and cost/price.
- ➔ Cost/price estimates were also to be subjected to a “cost realism analysis”.
- ➔ Management evaluation factor “moderately” more important than past performance and technical factors.
- ➔ Past performance and technical factors individually would be considered moderately more important than final cost/price estimates.
- ➔ SSA awarded contracts to Fluor, KBRSI, and DynCorp.





LOGCAP IV – Bid Protest

- ➔ Protests filed by CMG and IAP.
- ➔ Evaluation of Fluor's Technical Proposal - *Sustained*
 - Fluor's proposal assumed a period of time between Task Order award and Notice to Proceed.
 - The protestor, CMG, argued that the Army's acceptance of this assumption permitted Fluor to use the assumption to aid in its development of its technical and cost proposals (ultimately aiding its \$40m lower freight costs).
 - GAO found that Army failed to treat all offerors equally.
- ➔ Evaluation of KBRSI's Technical Proposal - *Sustained*
 - KBRSI submitted information in its technical response plan included the use of a local supplier to lease heavy equipment.
 - Both protesters argued use of heavy equipment subcontractor was unreasonable because of lack of past performance by subcontractor.
 - GAO found that the Army failed to treat all offerors equally.



LOGCAP IV – Bid Protest

- ➔ Evaluation of KBRSI's Management Proposal - ***Sustained***
 - The protesters argued the Army's evaluation of the proposal as "outstanding" under the business systems sub-factor and "outstanding" overall under the management evaluation factor was unreasonable.
 - The DCAA audit raised a number of concerns with respect to KBRSI's accounting system, estimating system, purchasing system and billing system
 - Despite this report, the Army's proposal evaluation rated KBRSI's business systems "Outstanding".
 - GAO concluded Army's "Outstanding" rating was inconsistent with a thorough review.
- ➔ Host Country National (HCN) Evaluation - ***Denied***
 - Protestors claimed solicitation was flawed in its explanation for the requirements for the use and mix of HCNs, third country nationals (TCNs), and/or U.S. nationals (ExPats).
 - GAO denied this claim.



LOGCAP IV – Bid Protest Resolution

- ➔ Solicitation initiated in 2006, awarded and protested in 2007, re-competed and re-awarded in 2008.
- ➔ Contract delayed a total of 295 days.
 - The incumbent, KBR, had their existing contract extended during the protest process (approx \$1m/day).
- ➔ First task orders were just recently issued.
- ➔ Lessons Learned
 - Program personnel believed that the award would be protested
 - Maintaining focus over long-term source selection is difficult
 - Source Selection teams still need to make every effort to:
 - Ensure standardized evaluation criteria
 - Ensure information is updated
 - Offerors have complete understanding of evaluation process



ITES-2S

Bid Protests



Information Technology Enterprise Solutions-2 Services Contract (ITES-2S) – Background

- ➔ U.S. Army has sought streamline IT services by outsourcing them via an umbrella contract called Information Technology Enterprise Solutions-2 Services (ITES 2S).
- ➔ Designed to award multiple IDIQ contracts for a base 3-year period, to be followed with three additional 2-year options.
- ➔ Flexible performance scope of the ITES-2S contract allowed the private sector to provide all IT solutions for the Army that did not fall under the existing Installation Information Infrastructure Modernization Program or what could be considered Command, Control, Communications, Computers and Information Management (C4I) requirements.



ITES-2S – Evaluation



- ➔ Awards for the ITES-2S contract were evaluated on three criteria: (1) mission support, (2) performance risk (past performance, corporate experience, and financial), and (3) price.
- ➔ In April 2006 Source Selection Authority (SSA) selected 11 proposals for award, 8 large businesses and 3 small businesses.
- ➔ Protests were filed by 5 firms.
- ➔ Prior to the GAO review the Army independently withdrew the awards, resulting in the GAO protests being dismissed.



ITES-2S – Bid Protest

- ➡ Following the dismissal, the awards were reviewed internally by the Army and the original award winning firms were re-awarded the same work, protests were re-filed with GAO.
- ➡ Change in Requirements - *Denied*
 - Four of the protesting firms claimed the Army failed to amend the solicitation because during the proposal process it was indicated the Army desired to make the ITES-2S contract vehicle *required* for all Army IT services.
- ➡ Evaluation of Labor Rates - *Sustained*
 - Three of the protestors, Multimax, BAE and Pragmatics, complained that the Army's evaluation of proposed labor rates was unreasonable.
 - The Army, used a two-step process to evaluate the labor rates and assess "price reasonableness."
 - First, comparing offeror rate to Independent Government Cost Estimate (IGCE), then calculating mean rate for each offerors labor category.
 - Next, a two standard deviation measure was used to determine price reasonableness of each offeror's rate for that category.



ITES-2S – Bid Protest

- ➔ Program was delayed a total of approx 900 days
- ➔ All protestors were placed on contract
- ➔ Lessons Learned
 - Price evaluation was muddled, process did not provide a valid methodology for identifying outlier rates.
 - Based on the size of the initiative, a bid protest seemed inevitable.
 - Costs (manpower and schedule) for the Army to respond to bid protests were significant.



Iraq Translation and Interpretation Program

Bid Protests

Iraq Translation and Interpretation Program – Background

- ➔ Purpose: Provide translation services for US forces in Iraq.
 - Current operations in Iraq require assistance from the private sector for translation and interpretation services because current requirements call for support far beyond what the military and intelligence community can provide alone.
- ➔ In December of 2006 the U.S. Army Intelligence and Security Command (INSCOM) awarded a 5-year, \$4.65 billion contract for Iraq-related translation and interpretation to GLS, a partnership formed between DynCorp International and McNeil Technologies.
- ➔ Incumbent was L-3 Communications-Titan Corporation (L-3).
- ➔ Under the terms of the contract, GLS would hire some 7,000 local employees with another 2,200 U.S. civilians.





Iraq Translation and Interpretation Program – Bid Protest

- ➡ After award announcement was made, a GAO protest by L-3 delayed the award.
- ➡ Fill Rate - ***Sustained***
 - L-3 disputed the fill rate evaluation, issue was number of linguists that were proposed by the L-3.
 - Army considered L-3 staffing proposal to be more likely to create staffing shortfalls compared with GLS' proposal.
- ➡ Experience - ***Sustained***
 - L-3 claimed the Army was supposed to evaluate proposals based upon the contractors recent experience levels.
 - L-3 claimed the Army's Source Selection Authority (SSA) used a pass/fail assessment to evaluate whether an offeror's experience was satisfactory.
- ➡ Transition - ***Sustained***
 - L-3 protested the evaluation of the transition plan as submitted in response to the RFP.
 - The solicitation established the transition period to be 90 days. Immediately following the initial 90 day period, the awardee was to be performing at the level indicated in Task Order 1. As the offerors had different approaches to the transition, the differences had varying impacts on the evaluated costs, but no effect on the final costs to the government.

Iraq Translation and Interpretation Program – Resolution



- ➔ Program was delayed a total of 427 days.
- ➔ Following the sustain decision by GAO the Army responded one month later by issuing a Request for Reconsideration
- ➔ Following the refusal of the GAO to reconsider the matter, the Army issued an amendment to the original solicitation to re-evaluate the three evaluation sub-factors protested by L-3.
- ➔ Despite the recompetition, GLS was again awarded the contract.
- ➔ Lessons Learned
 - In the case of an existing contract, the incumbent may have an incentive to protest.
 - Fill rate evaluation criteria for labor contracts must be clear.
 - Must maintain consistent experience evaluation criteria.



HRsolutions

Bid Protests

HRsolutions – Background

- ➔ Program Office Launched in 2004.
- ➔ Created by the Deputy Under Secretary of the Army for Business Transformation (DUSA (BT)).
- ➔ Program provides the Army with a mechanism to outsource those HR functions that are appropriate for execution by the private sector.
- ➔ 12 prime contractors were awarded contracts with approximately 125 subcontractors.
- ➔ The Army issued one RFP for the program on July 29, 2006, as a set-aside for historically underutilized business zone (HUBZone) small businesses, seeking firm fixed-price proposals to provide services for a 1-year base period and four 1-year option periods.
- ➔ Program was the subject of numerous protests by just one firm, Global Solutions (GSN), LLC after award was given to Accurate Conceptions (AC), LLC.





HRsolutions – Bid Protest

- ➔ Request for Proposals Protest - ***Denied***
 - GSN protested the procurement (the RFP itself) on three grounds:
 - A particular Army official was believed to be biased against GSN,
 - The procurement was conducted under the commercial item procedures,
 - The government estimate and workload data in the solicitation are incorrect.
- ➔ Numerous Small Business Administration Challenges - ***Denied***
- ➔ Numerous appeals within the Army itself through the Executive Level Agency Protest (ELAP) mechanism. During this process the Army did take corrective action, and despite this still awarded the contract to AC in January 2008.
- ➔ GSN Bid protest for misevaluation of their own proposal and AC's proposal - ***Denied***

HRsolutions – Resolution



- ➔ GSN filed bid protest with GAO after award for:
 - Misevaluation of Global Solutions, LLC proposal,
 - Misevaluation of Accurate Conceptions, LLC proposal,
 - Technical Evaluation – Failed to address issues in Technical Exhibit 1,
 - Personnel Evaluation – Price was too low,
 - Past Performance Evaluation – Relied Heavily on Sub-Contractors.
- ➔ GAO denied the protest and noted that a protestor must reasonably demonstrate that it was prejudiced by the agency's actions.
- ➔ Lessons Learned
 - The bid protest process can be easily abused.



Conclusions

- ➔ In general, bid protests are not a large problem within the context of all DoD contracting.
 - The number of bid protests not increasing as rapidly as the total dollars contracted.
 - Rate of merit protests (particularly those that are sustained) is decreasing, especially when the total dollars contracted are considered.
 - For those programs affected, however, impacts can be significant.
- ➔ Perception of more protests is likely a result of an increase in high-profile/high-impact protests.
- ➔ Costs (as combination of programmatic costs and schedule delays) for bid protests, particularly those that have merit, are high.
- ➔ When the stakes are high, bid protests are likely, no matter what, especially for complex, long-term and high-value contracts—**there is no disincentive to try for another bite at the apple.**
- ➔ The GAO bid protest process is important to maintain the reality and perception of fairness and transparency of DoD acquisition, but the process can be abused.
- ➔ Section 843 of the 2008 Defense Authorization Act lifted ban on GAO protest for task orders valued over \$10M—impact not yet evident.



Recommendations

- ➔ Work to eliminate reasons for protests
 - Use standardized evaluation criteria (evaluation must match RFP criteria).
 - Ensure information is updated and accurate (such as external audits or evaluations being considered during an evaluation).
 - Use fair, consistent, and well understood cost evaluation methods.
 - Offerors must have a complete understanding of the evaluation process.
- ➔ Balance the need for program stability versus the perception of locking contractor out of a business sector for long periods.
- ➔ Examine mechanisms to create disincentives to minimize abuse and frivolous protest
 - NFL coaches can challenge a play call, but lose a time-out if they are wrong.
 - An example of a penalty might be consideration of protest history (e.g. unsustained protests) in a company's "past performance" evaluation during source selections.